

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JIMMY L. E.,

Plaintiff,

v.

**COMMISSIONER OF SOCIAL
SECURITY,**

Defendant.

Case No. 3:20-cv-5444-TLF

ORDER REVERSING AND
REMANDING DEFENDANT'S
DECISION TO DENY BENEFITS

Plaintiff has brought this matter for judicial review of defendant's denial of his application for disability insurance benefits.

The parties have consented to have this matter heard by the undersigned Magistrate Judge. 28 U.S.C. § 636(c); Federal Rule of Civil Procedure 73; Local Rule MJR 13.

I. ISSUES FOR REVIEW

- A. Whether the ALJ Properly Evaluated Plaintiff's Subjective Symptom Testimony
 - B. Whether the ALJ Properly Evaluated Medical Opinion Evidence

II. BACKGROUND

On August 9, 2017, Plaintiff filed an application for DIB, alleging therein a disability onset date of May 1, 2017. Administrative Record (“AR”) 348. Plaintiff’s application was denied upon official review and upon reconsideration. AR 163, 174. A hearing was held before Administrative Law Judge (“ALJ”) Rebecca Jones on August

1 17, 2018. AR 44–102. On January 25, 2019, ALJ Jones issued a decision finding that
2 Plaintiff was not disabled. AR 190–202. On April 17, 2019, the Social Security Appeals
3 Council issued an order remanding the case for further consideration of Plaintiff’s
4 limitations and to obtain medical expert testimony. AR 210–11

5 A new hearing was held before the same ALJ on August 8, 2019. AR 103–62. On
6 October 30, 2019, the ALJ issued a decision again finding that Plaintiff was not
7 disabled. AR 17–43. On March 11, 2020, the Social Security Appeals Council denied
8 Plaintiff's request for review. AR 1–6.

III. STANDARD OF REVIEW

Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of Social Security benefits if the ALJ's findings are based on legal error or not supported by substantial evidence in the record as a whole. *Revels v. Berryhill*, 874 F.3d 648, 654 (9th Cir. 2017). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019) (internal citations omitted).

IV. DISCUSSION

In this case, the ALJ found that Plaintiff had the severe, medically determinable impairments of degenerative disc disease of the lumbar spine, obstructive sleep apnea, migraine tension headaches, right shoulder ACL joint arthritis status-post arthroscopic surgery, left shoulder strain with labral tear and ACL osteoarthritis, bilateral pes planus with plantar fasciitis, sinusitis, cervical strain, and bilateral carpal tunnel syndrome. AR 24. Based on the limitations stemming from these impairments, the ALJ found that Plaintiff could perform a reduced range of sedentary work. AR 24. Relying on vocational

1 expert testimony, the ALJ found at step four that Plaintiff could not perform any past
2 relevant work, but could perform other jobs existing in significant numbers in the
3 national economy, thus concluding at step five that Plaintiff was not disabled. AR 33.

4 A. Whether the ALJ Properly Evaluated Plaintiff's Subjective Symptom Testimony

5 Plaintiff assigns error to the ALJ's evaluation of his subjective symptom
6 testimony. Dkt. 24, p. 9.

7 To reject a claimant's subjective complaints, the ALJ's decision must provide
8 "specific, cogent reasons for the disbelief." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir.
9 1996) (citation omitted). The ALJ "must identify what testimony is not credible and what
10 evidence undermines the claimant's complaints." *Id.; Dodrill v. Shalala*, 12 F.3d 915,
11 918 (9th Cir. 1993). Unless affirmative evidence shows the claimant is malingering, the
12 ALJ's reasons for rejecting the claimant's testimony must be "clear and convincing."
13 *Lester*, 81 F.2d at 834. "[B]ecause subjective descriptions may indicate more severe
14 limitations or restrictions than can be shown by medical evidence alone," the ALJ may
15 not discredit a subjective description "solely because it is not substantiated affirmatively
16 by objective medical evidence." *Robbins v. Social Sec. Admin.*, 466 F.3d 880, 883 (9th
17 Cir. 2006).

18 At the first hearing, Plaintiff testified that, after retiring from the Army, he had
19 planned to be a commercial driver but lost his commercial driver's license due to the
20 difficulty he had manipulating a truck's controls and his need for pain medication. AR
21 55. He stated that he could not lift overhead or bend over, had shoulder pain, and
22 dropped things frequently due to numbness in his hands. AR 62–63. He stated that he
23 had day-long, intense headaches once a week, and the only treatment was ibuprofen.

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1 AR 68. He stated that he had been recommended for ulnar nerve surgery to address his
2 carpal tunnel syndrome, but this had not taken place. AR 68–69. He stated that he wore
3 high arch shoes due to plantar fasciitis, could walk for 150 feet at a time before needing
4 five to ten minutes of rest, could lift nothing heavier than a gallon of milk, and could sit
5 for 20-30 minutes before needing to shift positions. AR 63, 69–70, 73, 75–76.

6 Plaintiff stated that he could use a smartphone, provided he could manipulate the
7 screen with a stylus; drove to Redding, California, by splitting the driving with his wife;
8 drove in a car for a total of six hours per week; and used marijuana to soothe his pain
9 symptoms twice a week. AR 56–58.

10 At his second hearing, Plaintiff testified that his symptoms had worsened, and
11 that despite his dieting efforts he had gained 30 pounds, which exacerbated his
12 symptoms. AR 129–30. He stated that he dropped items frequently, that he had to sell
13 his family's goats because he could not care for them, he could type "regular" for only
14 five minutes at a time, and he could stand with a cane for only ten minutes at a time. AR
15 143. He stated that he required the help of his wife and children to accomplish everyday
16 tasks. AR 138.

17 The ALJ found Plaintiff not fully credible, reasoning that his statements regarding
18 his limitations were inconsistent with (1) his activities of daily living; (2) medical
19 evidence; (3) his improvement with generally conservative treatment; (4) his failure to
20 seek further recommended treatments; (5) evidence of symptom magnification; and (6)
21 his cessation of work for non-disability-related reasons. AR 30–31.

22 As to the first reason, Plaintiff's activities of daily living do not contradict his
23 testimony regarding his limitations.

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1 A claimant's participation in everyday activities indicating capacities that are
 2 transferable to a work setting may constitute a specific and legitimate reason for
 3 discounting a medical opinion. See *Morgan v. Comm'r Soc. Sec. Admin.*, 169 F.3d 595,
 4 600 (9th Cir.1999).

5 Yet disability claimants should not be penalized for attempting to lead normal
 6 lives in the face of their limitations. See *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir.
 7 1998), citing *Cooper v. Bowen*, 815 F.2d 557, 561 (9th Cir.1987) (a disability claimant
 8 need not "vegetate in a dark room" in order to be deemed eligible for benefits).

9 Here, the ALJ identified Plaintiff's ability to prepare meals, do laundry, load and
 10 unload a dishwasher, handle his own personal care, and drive for a total of six hours per
 11 week, in addition to occasionally driving to California. AR 25, 27. The ALJ did not,
 12 however, address Plaintiff's testimony that he usually required the help of his wife or his
 13 children to accomplish most of these tasks, with the exception of the weekly driving—on
 14 trips to California, he alternated driving with his wife. AR 58. On appeal, the
 15 Commissioner argues that driving for six hours per week is inconsistent with Plaintiff's
 16 testimony that he could not sit for more than half an hour at a time without changing
 17 positions; however, Plaintiff did not state that his driving required him to be seated for
 18 longer than this. See Dkt. 30, p. 4.

19 With respect to the ALJ's second reason, an inconsistency with the objective
 20 evidence may serve as a clear and convincing reason for discounting a claimant's
 21 testimony. *Regennitter v. Comm'r of Social Sec. Admin.*, 166 F.3d 1294, 1297 (9th Cir.
 22 1998). But an ALJ's decision may not reject a claimant's subjective symptom testimony
 23 "solely because the degree of pain alleged is not supported by objective medical

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1 evidence." *Orteza v. Shalala*, 50 F.3d 748, 749-50 (9th Cir. 1995); *Byrnes v. Shalala*, 60
2 F.3d 639, 641-42 (9th Cir. 1995) (applying rule to subjective complaints other than
3 pain).

4 In this situation, the ALJ relied on MRIs and radiographs (dated before the
5 relevant period) that showed only mild degenerative disc disease, treatment notes of
6 normal gait and independent ambulation, only mild degenerative changes in his
7 shoulder after a 2016 surgery, and his grip strength being hindered only by poor effort.
8 AR 26–27. This collection of raw data from before the relevant period is not substantial
9 evidence, on its own, for the ALJ to find a discrepancy between Plaintiff's medical
10 records as compared with Plaintiff's subjective symptom statements. There are many
11 medical records before and during the relevant period that show increasing pain and
12 multiple concerns and medical interventions for issues with Plaintiff's migraine
13 headaches, back, neck, wrists, arms, hands, and shoulders. E.g., AR 1041-1042 (Dr.
14 Scott, Neurology assessment and carpal tunnel pain evaluation, March and April 2016);
15 1050-1052 (Orthotist Nestor Dulce issues wrist braces and elbow pads after MRI
16 showing arthritis, rotator cuff tear, ACJ degeneration, March 2016); 1059-1063 (Dr.
17 Larsen's assessment of carpal tunnel syndrome, and right Martin-Gruber
18 anastomomosis, March 2016); 1077 (Dr. Scott's assessment of headaches and head
19 trauma, February 2016); AR 1081-1096 (Dr. Arrington, Dr. Cranston, Dr. Olsen and CPT
20 Bean, MRI showing labral tear and rotator cuff tears, assessment of shoulder pain,
21 bilateral arm pain, and assessment of cervical neck pain, February 2016); AR 1810-
22 1813 (Dr. Leinenbach's assessment and diagnoses, stating that among other
23 limitations, reaching is limited -- September 2017); 2054-2056 (Dr. Yang, injections to
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1 address back and hip pain, December 2018); 2061-2064 (analysis of pain management
 2 options by Dr. Yang, September 2018); 2066 (Dr. Tian, injection therapy for pain in
 3 lumbar area, June 2019); 2077-2079 (Dr. Borgkvist, shoulder arthroscopy, February
 4 2019); 2081-2082 (Dr. Halpin, assessment of back pain, August 2018).

5 With respect to the ALJ's third reason, the effectiveness of treatment is a relevant
 6 factor in determining the severity of a claimant's symptoms. 20 C.F.R. § 416.929(c)(3);
 7 see *Warre v. Comm'r of Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006);
 8 *Tommasetti v. Astrue*, 533 F.3d 1035, 1040 (9th Cir. 2008) (a favorable response to
 9 treatment can undermine a claimant's complaints of debilitating pain or other severe
 10 limitations). "However, the fact that a patient's symptoms may fluctuate to some degree
 11 does not compel the conclusion that the record is 'contradictory' as to his disability or
 12 that he can consistently function better than the negative reports reflect." *Sorensen v.*
 13 *Barnhart*, 69 Fed. Appx. 864, 866 (9th Cir. 2003).

14 The ALJ relied on Plaintiff's testimony that his pain management medications
 15 and CPAP equipment mitigated his symptoms, examinations shortly after surgeries
 16 showed improvement, and Plaintiff did not obtain surgery between 2017 and 2019. AR
 17 30. However, at the time of the second hearing, Plaintiff testified that his symptoms had
 18 worsened and caused significant weight gain that, in turn, further hindered his mobility.
 19 AR 129–30.

20 Plaintiff also testified that he was prescribed Tramadol, an opioid pain
 21 medication, for his symptoms, and that he used cannabidiol, or CBD, a marijuana
 22 product, when Tramadol alone was not enough. AR 56–57. In general, the Ninth Circuit
 23 has viewed the use of narcotic pain medication as non-conservative treatment,

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1 particularly when in conjunction with other treatments that were also not conservative.
2 See, e.g. *Lapeirre-Gutt v. Astrue*, 382 F. App'x 662, 664 (9th Cir. 2010) (holding
3 treatment consisting of "copious" amounts of narcotic pain medication, occipital nerve
4 blocks, and trigger point injections was not conservative). Here, Plaintiff's use of
5 prescribed narcotics along with marijuana, in addition to surgical interventions, cannot
6 fairly be described as "conservative" treatment.

7 With respect to the ALJ's fourth reason, Ninth Circuit case law is clear that if a
8 claimant complains about disabling pain but fails to seek treatment -- or fails to follow
9 prescribed treatment for the pain -- an ALJ may use such failure as a basis for finding
10 the complaint unjustified or exaggerated. *Orn v. Astrue*, 495 F.3d 625, 638 (9th Cir.
11 2007) (citing *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989)). An ALJ, however, may
12 not draw inferences about an individual's symptoms from a failure to pursue medical
13 treatment without first considering any explanations that a claimant may provide. SSR
14 16-3p, 2017 WL 5180304, at *9. Here, the ALJ pointed specifically to Plaintiff's failure to
15 follow up on a referral for carpal tunnel releases, but did not address Plaintiff's
16 testimony that the delay was due to issues related to Veterans Administration
17 bureaucracy and substantial changes in that agency's health care system, which
18 caused him to lose contact with his treating doctor. AR 114–27. Without accounting for
19 Plaintiff's explanation, the ALJ's reliance on Plaintiff's purported failure to seek
20 treatment was erroneous.

21 With respect to the ALJ's fifth reason, a claimant's tendency to exaggerate
22 symptoms is a permissible reason to find that claimant's testimony incredible.
23 *Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9th Cir. 2001). Here, the ALJ stated that
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1 Plaintiff's presentation at a 2018 consultative examination was markedly different than
2 his presentation at an examination five months earlier: his gait, sensation, strength,
3 ability to heel-toe walk, squat, and manipulate objects was diminished. AR 27–28 (citing
4 AR 1815–21). The ALJ did not cite any findings from medical sources indicating that
5 Plaintiff magnified his symptoms. In addition, the sole medical examination supporting
6 the purported symptom magnification was one on which the ALJ chose not to rely. AR
7 31. Without more, the ALJ's interpretation of these results to indicate symptom
8 magnification was not a finding supported by substantial evidence.

9 With respect to the ALJ's sixth reason, an ALJ may point to evidence that the
10 claimant stopped working for reasons unrelated to his alleged impairments to
11 undermine his symptom allegations. *Tommasetti*, 533 F.3d at 1040.

12 The ALJ relied on outside knowledge to the exclusion of Plaintiff's explanation of
13 the circumstances under which he retired from the Army. The ALJ focused on an
14 isolated statement about being "forced" to leave that Plaintiff subsequently clarified was
15 imprecise, and in her decision alleges without any citation that Plaintiff's discussion of
16 his retirement from the Army was false. Dkt. # 19-2, p. 30. The ALJ highlighted the fact
17 that there was no report from a medical evaluation board ("MEB") or physical evaluation
18 board ("PEB"). AR 29. However, there is no explanation as to how this lack of an
19 MEB/PEB was discordant with Plaintiff's testimony that his impairments resulted in his
20 assignment to desk jobs and convinced to leave the military by his impairments. Plaintiff
21 does not assert that he was medically discharged. He retired. At the hearing, the ALJ
22 disagreed with Plaintiff's explanation by stating that she had seen people who were
23 higher ranking who had to have an MEB/PEB, but Plaintiff was discussing his

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1 permanent P3 status (which happened to coincide with his being a non-commissioned
 2 officer). When Plaintiff asked for clarification as to the “higher ranking” individuals to
 3 whom the ALJ was referring, the ALJ provided no answer, stating that “this part of the
 4 conversation is done.” AR 132–33. The ALJ made no reference to Plaintiff’s P3 status in
 5 her decision. The ALJ’s mischaracterization of the record to arrive at a conclusion that
 6 Plaintiff lied about the circumstances of his discharge was not supported by substantial
 7 evidence.

8 B. Whether the ALJ Properly Evaluated Medical Opinion Evidence

9 Plaintiff assigns error to the ALJ’s evaluation of medical opinions from examining
 10 physician Dr. Leinenbach. Dkt. 24, p. 5. Plaintiff also assigns error to the ALJ’s partial
 11 reliance on the opinions of non-examining medical consultants; however, an ALJ is not
 12 required to give reasons for crediting, as opposed to rejecting, medical opinion evidence.
 13 *Howard v. Barnhart*, 341 F.3d 1393, 1395 (9th Cir. 1984).

14 Under current Ninth Circuit precedent, an ALJ must provide “clear and
 15 convincing” reasons to reject the uncontradicted opinions of an examining doctor, and
 16 “specific and legitimate” reasons to reject the contradicted opinions of an examining
 17 doctor. See *Lester*, 81 F.3d at 830–31.

18 The Social Security Administration changed the regulations applicable to
 19 evaluation of medical opinions; hierarchy among medical opinions has been eliminated,
 20 but ALJs are required to explain their reasoning and specifically address how they
 21 considered the supportability and consistency of each opinion. See 20 C.F.R. §
 22 416.920c; Revisions to Rules Regarding the Evaluation of Medical Evidence, 82 Fed.
 23 Reg. 5844-01 (Jan. 18, 2017). Under 20 C.F.R. § 416.920c(a), (b)(1)-(2), the ALJ is
 24 required to explain whether the medical opinion or finding is persuasive, based on

1 whether it is supported and whether it is consistent. *Brent S. v. Commissioner, Social
2 Security Administration*, No. 6:20-CV-00206-BR, 2021 WL 147256 at *5 - *6 (D. Oregon
3 January 16, 2021). These are the two most important factors in the ALJ's evaluation of
4 medical opinions or findings; therefore, "[t]he 'more relevant the objective medical
5 evidence and supporting explanations presented' and the 'more consistent' with
6 evidence from other sources, the more persuasive a medical opinion or prior finding."
7 *Linda F. v. Saul*, No. C20-5076-MAT, 2020 WL 6544628, at *2 (quoting 20 C.F.R. §
8 404.1520c(c)(1)-(2)).

9 Before, and after, the change to the regulations, an ALJ's reasoning must be
10 supported by substantial evidence and free from legal error. *Ford v. Saul*, 950 F.3d
11 1141, 1153-56 (9th Cir. 2020) (citing *Tommasetti*, 533 F.3d at 1038); *see also Murray v.*
12 *Heckler*, 722 F.2d 499, 501–02 (9th Cir. 1983).

13 1. Dr. Leinenbach

14 Derek Leinenbach, M.D., examined Plaintiff on September 28, 2017, and
15 diagnosed him with: lumbago, favor mild spondylosis; bilateral sacroiliac joint pain;
16 traumatic brain injury with residual subjective decrease in focus and concentration;
17 chronic headaches; bilateral hand paresthesia, favor bilateral carpal tunnel syndrome
18 with possible right ulnar neuropathy; and bilateral rotator cuff syndrome, right worse
19 than left. AR 1810-1813. Based on these impairments, he opined that Plaintiff would be
20 limited to carrying 50 pounds occasionally and 10 pounds frequently; could stoop on an
21 occasional basis only; could reach occasionally on his right side and frequently on his
22 left; and could feel only frequently. AR 1813. He opined that Plaintiff did not have any
23 other limitations. *Id.*

1 The ALJ found Dr. Leinenbach's opinion partially persuasive, reasoning that
2 "later studies show that [Plaintiff] is more limited in other areas than found by Dr.
3 Leinenbach," and his manipulative limitations should apply bilaterally. AR 31.

4 Plaintiff assigns error to the ALJ's evaluation of Dr. Leinenbach's opinion
5 because the ALJ, without explanation, found that Plaintiff was limited only in his ability
6 to reach overhead, and not to reach generally. Dkt. 24, p. 6. In response, the
7 Commissioner asserts that the ALJ adopted an RFC consistent with Dr. Leinenbach's
8 findings of only mild deficits in the range of motion in the shoulders, along with medical
9 evidence indicating the same throughout the record. Dkt. 25, p. 15. However, the ALJ
10 did not state any reason as to why Plaintiff was limited only in overhead reaching and
11 not reaching more generally, and the reasons for such a finding asserted by the
12 Commissioner were not relied on by the ALJ.

13 In addition, the ALJ did not address the difference between the opinion of Dr.
14 Leinenbach that Plaintiff's reaching ability was limited and the opinions of the non-
15 examining medical consultants that Plaintiff was only limited in overhead reaching.
16 Without such a finding, there is no way for this Court to review whether the ALJ's
17 assessment was reasonable. "Long-standing principles of administrative law require us
18 to review the ALJ's decision based on the reasoning and factual findings offered by the
19 ALJ—not *post hoc* rationalizations that attempt to intuit what the adjudicator may have
20 been thinking." *Bray v. Commissioner of Social Security Admin.*, 554 F.3d 1219, 1225
21 (9th Cir. 2009) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196, 67 S. Ct. 1575, 91 L.
22 Ed. 1995 (1947)).

1 Accordingly, the ALJ erred in rejecting a limitation on general reaching without
2 providing an explanation as to why.

3 CONCLUSION

4 Based on the foregoing discussion, the Court finds the ALJ harmfully erred in the
5 decision determining plaintiff to be not disabled. Defendant's decision to deny benefits
6 therefore is REVERSED and this matter is REMANDED for further administrative
7 proceedings. The ALJ is directed to conduct a de novo hearing, offer Plaintiff an
8 opportunity to supplement the record with additional medical evidence, re-evaluate
9 Plaintiff's testimony and consider any new testimony Plaintiff may offer, in addition to
10 reconsidering and explaining the limitations supported by the medical opinions.

11 Dated this 10th day of September, 2021.

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15 Theresa L. Fricke
16 United States Magistrate Judge
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